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No. 83-2057

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. THE PETITION PRESENTED TO THE CALIFORNIA SUPREME COURT COMPLIED WITH STATE PROCEDURES IN EVERY RESPECT

Respondent in his brief in opposition to petitioner's Petition for Writ of Certiorari argues that said petition should be denied by this Court, contending that petitioner "failed to conform to California procedural requirements" in filing the Petition for Writ of Habeas Corpus in Crim. 23573 (Opposition, pp. 15-16). Specifically, respondent asserts that the petition was not properly brought before the California Supreme Court because (1) under California law, Habeas Corpus cannot be employed as a "second appeal" and at the time Crim. 23573 was filed, "the identical issues were already pending before the

California Supreme Court [in a Petition for Hearing on petitioner's direct appeal]" {Opposition, pp 16-17, 22}; and {2} because the California Supreme Court is not designed to conduct evidentiary hearings, the original application for a Petition for Writ of Habeas Corpus should have been made in the trial court {Opposition, pp. 17-18}.

Both of respondent's contentions are devoid of merit.

Initially, petitioner would note that while it is true that under California law Habeas Corpus ordinarily should not be used as a second appeal {see, In re Foss {1974} 10 C.3d 910, 930}, it is manifest that petitioner at no time has attempted to use the Habeas Corpus procedure as a "second appeal"

in the instant case. Petitioner in connection with the instant proceedings brought to the attention of the California Supreme Court numerous allegations of blatant prosecutorial misconduct which could not be resolved by way of direct appeal, quite simply, because the documentation supporting such allegations was beyond the scope of the trial record and because the investigation verifying the incidents of prosecutorial misconduct in question extended well beyond the conclusion of petitioner's trial. These facts justifying the filing of a Petition for Writ of Habeas Corpus have in fact been alleged in petitioner's moving papers in the present case {see, Petition in 83-2057, pp 27-28}.

Accordingly, although limited

issues relating to prosecutorial misconduct were raised by way of direct appeal, a full hearing on the merits of these issues, at least by way of direct appeal, was precluded because the record on appeal necessarily did not include all of the documentation essential to a proper resolution of petitioner's claims. It is precisely this type of situation that justifies a petitioner seeking relief by way of habeas corpus under California law. For example, in People v. Pope (1979) 23 Cal.3d 412, 428-430, the defendant sought review of his claims of inadequacy of trial counsel by way of direct appeal; the California Supreme Court held that the trial record contained insufficient documentation of his claims but that habeas corpus was available to the defendant for the

purpose of allowing the defendant to fully litigate his claims at an evidentiary hearing.

Clearly, relief by way of habeas corpus is available where there has been no opportunity to properly raise the issue in question on appeal, see, In re Spencer {1965} 63 Cal.2d 400, 405,406, and respondent concedes this fact {Opposition, at p. 22, citing In re Gomez {1973} 31 Cal.App.3d 728, 732}. As has been alleged in the petition now before this court, {at pages 27-28}, habeas corpus provided the only meaningful remedy for review of his allegations of prosecutorial misconduct. Respondent's assertion to the contrary not withstanding, petitioner has not used habeas corpus as a "second appeal" and there is no

merit for his assertion that certiorari should be denied on this ground.[1]

Respondent's contention that his Petition for Writ of Habeas Corpus, having been filed in the California Supreme Court as opposed to the trial court, was procedually defective for this reason, must likewise fail. California law permits a Court of Appeal to consider a Petition for Writ of Habeas Corpus in conjunction with a

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1. The fallacy of respondent's assertion that petition in this case attempted to use habeas corpus as a second appeal is apparent from the language of the Court of Appeal Opinion cited by him {Opposition, at pp 20-21}. That language indicates that the Court of Appeal, although entertaining the Petition for Writ of Habeas Corpus, never considered the documentation of the allegations contained therein, whereas the appropriate procedure would have been to grant petitioner an evidentiary hearing on the truth of his allegations {see, argument II, infra.}

related appeal pending, subject to the discretion of the Court of Appeal {In re Rinegold {1970} 13 Cal.App.3d 723, 725, n.1.} In this case, the Court of Appeal chose to exercise its discretion and consolidate petitioner's Petition for Writ of Habeas Corpus with his direct appeal {Opinion of the Court of Appeal, Exhibit "Y" attached to Crim. 23573, p. 24; In re Martin {1983} 150 Cal.App.3d 148}. The Court of Appeal thereafter denied the petition. Manifestly, it would have been a futile act to seek habeas corpus relief in any forum other than the California Supreme Court. While the latter Court is indeed not a trial court designed to conduct evidentiary hearings, California procedure provides that a reviewing court in considering a Petition for Writ of Habeas Corpus, may order the

matter transferred to a lower court or to a special referee for purposes of conducting an evidentiary hearing on petitioner's claims. See, e.g., In re Lower {1979} 100 Cal.App.3d 144, 152-153. This in fact was the procedure that should have been followed by the California Supreme Court in the present case upon petitioner's unmistakeable prima facie showing that he was entitled to relief by way of habeas corpus. In any event, the petition in every respect has properly complied with State Court procedures in presenting this matter and respondent's suggestion to the contrary must therefore be rejected.

II. THE INSTANT PETITION DOES NOT PRESENT FACTUAL ISSUES, AS DISTINGUISHED FROM LEGAL ISSUES, TO THIS COURT FOR ITS RESOLUTION

Respondent, characterizing the instant petition as a request that this Court "undertake an independent review of the record {...including over 2,300 pages of reporter's transcript}" to determine the materiality of the issues raised therein, argues that Certiorari should be denied because "Questions of fact are not properly the subject for review in this Court." {Opposition, pp. 28-30}. Respondent however, misanalyzes the problem. His contention, because it is grounded upon a faulty promise in the first instance, must be rejected.

Respondent does correctly observe that petitioner by way of the instant petition is not seeking review of the opinion of the Court of Appeal in In re Martin, supra.[2] Rather, he seeks review of the Order of the Supreme Court of California denying his Petition for Writ of Habeas Corpus in Crim. 23573 {Petition, page 10}. Under any rational reading of the allegations contained in that latter petition, petitioner clearly and unmistakably has made out a prima facie case for

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2. Although respondent asserts that "Petitioner has expressly avoided" seeking review by this Court of the opinion of the Court of Appeal in 4 Crim. 13945 {the direct appeal}. {Opposition, pp 24, 29}. Petitioner would note that such a petition has been filed separately {83-2062}. Obviously, separate petitions are necessary so as to avoid seeking certiorari to different courts in the same petition.

relief.

Indeed, the nature of the allegations contained in Crim. 23573 and the documentation offered in support thereof, which will not be repeated in this Reply, render an "independent review" of the record, either by the California Supreme Court or by this Court, superfluous. The sole issue to be resolved upon review by the California Court was, "can petitioner prove his allegations in open Court?" If so, he is entitled to a reversal of the judgment; petitioner's right to a hearing however, cannot be the subject of serious dispute.

As the Ninth Circuit recently held in U.S. v. Lord {9th Cir. 1983} 711 F.2d 887, 891:

> "...an unrebutted prima facie showing of prosecutorial misconduct that could have prevented a defense witness from giving relevant testimony justifies remand for an evidentiary hearing."

For the foregoing reasons, respondent's assertion petitioner is demanding a review of the trial record by this court is, quite simply, inaccurate. Such a review would indeed be a waste of time in light of the fact that the Opinion of the Court of Appeal, attached, to Crim. 23573 as Exhibit "Y", has already found that the prosecutor willfully suppressed <u>substantial material</u> evidence {at pp 27-28, emphasis added}. In view of this conclusion, all that remained for the California Supreme Court to do upon review of Crim. 23573 was to issue an order to show cause and remand the

matter for an evidentiary hearing. In re Lawler (1979) 23 Cal.3d 190, 194; In re Lower, supra.

From the language of the Court of Appeal, it is likewise apparent that Respondent's suggestion, i.e., that the issues of the correct standard of review is not raised by the instant petition, must also fail (opposition, p. 29). As petitioner pointed out in his petition, where, as here, substantial material evidence is suppressed, relief is appropriate (at p 39). The Court of Appeal, when faced with allegations which if true justified a new trial, see, Giglio v. United States (1971) 405 U.S. 150, 153, apparently applied an incorrect standard for granting relief as evidenced by its failure to issue an

order to show cause. It therefore devolved upon the California Supreme Court, upon review of Crim. 23573, to apply the correct standard and grant relief in the form of an evidentiary hearing. The California Supreme Court's refusal to do so was a perpetuation of the error of the Court of Appeal and on its face, a contravention of the mandates of this Court. No further review of the trial record is necessary to establish this fact.

III. REVIEW OF THE INSTANT CASE BY THIS COURT IS NECESSARY IN ORDER TO INSURE UNIFORMITY OF DECISION

A. A Conflict in the Law Currently Exists on the Issue of the Standard to be Applied in Determining Whether the Intimidation of Defense Witnesses by Prosecutorial Authorities is Reversible Error

Respondent citing this Court's opinion in United States v. Valenzuela-Bernal {1982} 458 U.S. 858, asserts that there is no conflict in the case law regarding the issue of the standard to be applied in determining whether intimidation of defense witnesses by the prosecution is reversible error {Opposition, at pp 34-35}. Petitioner would only note that even since this Court's opinion in Valenzuela-Bernal, supra, the lower federal courts have

continued to exhibit considerable confusion in identifying, articulating and applying the standard for reversal in cases involving intimidation of defense witnesses by the prosecution. See, e.g., United States v. Blackwell {D.C. Circuit 1982} 694 F.2d 1325, 1341-1342; United States v. Smith {1983} 577 F.Supp. 1232, 1237, n.5.[3]

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3. The Smith court, in discussing the right of a defendant to compulsory process in the context of harassment of defense witnesses by the prosecution, observed: "It is not entirely clear if this right is grounded in the Due Process Clause of the Fifth and Fourteenth Amendments, the Sixth Amendment, or both. United States v. Valenzuela-Bernal 458 U.S. 858,... {1982}; United States v Hammond, 598 F.2d at 1012 n. 3; United States v. Morrison, 535 F.2d at 226 n. 6. Nor is it clear whether or not, to establish the existence of the right in a particular case, prejudice must be shown. United States v. Blackwell, 694 F.2d 1325, 1341 {D.C. Cir. 1982}; United States v. Thomas, 488 F.2d at 335. {emphasis added}

B. The Question of the Proper Standard for Review In Cases Involving Intimidation of Defense Witnesses is Placed Squarely Before this Court by Virtue of the Instant Petition

Respondent in his Opposition asserts that the instant petition presents this Court not with the issue of the proper standard of review in cases involving defense witnesses by the prosecution, but rather with a request of this Court to review the entire record for purposes of determining if the errors which occurred herein were prejudicial (Opposition at p 36). Respondent's erroneous characterization of the instant petition has previously been addressed in this reply (see, argument II, supra). Clearly, such "review" of the record would be utterly

superfluous in view of the fact that under any rational reading, petitioner's allegations make out a prima facie case for relief.

In view of this fact and in view of the fact also that the California Supreme Court at the time of its order in the instant case had before it the factual finding of the Court of Appeal that the suppressed testimony was "material" {Exhibit Y, attached to the California Supreme Court Petition}, it is apparent that the issue of the proper standard of review is directly before this court. Obviously, the California Supreme Court employed an incorrect standard in summarily refusing to issue an Order to Show Cause in the instant case and order that an evidentiary hearing on petitioner's

allegations be conducted.

Respectfully submitted,

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